Supreme Court, U.S.
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No. 00-527

IN THE

Supreme Court of the United States

WALKER COUNTY SCHOOL DISTRICT,

Petitioner,

v.

JENSISNE BENNETT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Respondents make three principal arguments in opposition to the petition for certiorari in this case: *First*, they argue that there is no "meaningful conflict" among the courts of appeals concerning the standard for the admissibility of "additional evidence" in a civil action challenging a state administrative decision under the Individuals With Disabilities In Education Act ("IDEA"), because in all circuits, the trial courts "make a discretionary determination of admissibility of evidence." Opposition ("Opp.") at 8. *Second*, they contend that there is no federal interest in a uniform interpretation of the IDEA requirement that the court "shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(B)(ii); Opp. at 8. *Third*, they maintain that, even if a conflict exists, this case is not a perfect vehicle for its resolution, because the evidence at issue here could have been excluded, in any event, under Federal Rules of Evidence 401, 402, and 403. Opp. at 8. All of these arguments are entirely without merit, as we now show; and this Court should grant the petition to resolve a fully-developed conflict on an important and recurring question of federal law.

1.(a) In the Petition, we demonstrated that, in this case, the Eleventh Circuit interprets the IDEA requirement that the district court "shall hear additional evidence at the request of a party" to mean only that the district court may, in its discretion, hear "supplemental" evidence proffered by a party. App. 10a (adopting the standard of *Town of Burlington* v. *Dep't of Educ.*, 736 F.2d 773 (1st Cir. 1984)). In doing so, the Eleventh Circuit joined the Fourth, Seventh and Ninth Circuits, which also apply the *Town of Burlington* test. The Sixth Circuit has carefully considered the reasoning of *Town of Burlington*, however, and expressly declined to adopt it. It has opted instead to employ the statute's plain meaning, saying "[t]o 'add' means to join or unite; the limitation on

what can be joined inherent in the term 'supplement' is not present in the term 'add.'" *Metro. Gov't of Nashville & Davidson County* v. *Cook*, 915 F.2d 232, 234 (6th Cir. 1990). The Third Circuit has strongly intimated that it will construe the phrase "additional evidence" as broadly as did the Sixth Circuit in *Cook*. See Petition ("Pet.") at 12. There is, accordingly, an acknowledged conflict about the correct meaning of the statutory requirement that "[i]n any action brought under this paragraph, the court . . . shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(B)(ii).

Respondents characterize this conflict as one of "semantics" that is "neither functional nor outcome determinative." Opp. at 9. It is unclear whether respondents mean that this conflict in statutory construction *cannot* make a difference in what evidence is considered or that it *has not* made a difference, but in either event, respondents are wrong. Under *Town of Burlington*, a party cannot introduce evidence in its civil action challenging an IEP if that "evidence" is part of the record in the administrative proceeding. In this case, as in other cases adopting the *Town of Burlington* standard, the district court gave the word "evidence" a broad interpretation, forbidding the School District to introduce testimony from witnesses who previously testified, forbidding the School District to introduce testimony from new witnesses if that testimony is on the same "topic" as the testimony of a witness who testified at the administrative hearing, and forbidding the School District to introduce evidence that could have been introduced (but was not) at the administrative proceeding. App. 87a, 89a-90a. See, *e.g.*, 91a (refusing to hear testimony from the School District's expert, addressing the School District's "concern[] about the administrative hearing officer's determination as to Dr. Marcus' credibility" by "assur[ing] Plaintiffs that the Court has before it the transcript of Dr. Marcus' testimony . . . and is quite capable of making its own determination as to Dr. Marcus' credibility"); 92a (refusing to admit Dr. Freeman's testimony, although he did not testify

during the administrative proceeding, on the ground that "permitting Dr. Freeman to testify despite the absence of any showing [that he] was unavailable to testify at the administrative hearing effectively would permit Plaintiffs to reserve their best evidence for trial" and on the ground that it is "cumulative"); *id.* at 94a (refusing to admit testimony of Ms. Bailey on same grounds); *id.* at 95a-96a (refusing to admit testimony of John Bennett on same grounds); *id.* at 100a (refusing to admit testimony of Ms. Driggers on same grounds); *id.* at 102a-103a (refusing to admit evidence because another witness testified at the administrative hearing "about these issues"); *id.* at 100a, 105a (refusing to admit noncumulative testimony of Ms. Cannon, Ms. Lesperance, Ms. Drennan because the School District had not explained why it did not call these witnesses at the administrative hearing).

In addition, the district court admitted certain documents not part of the administrative record, casting substantial doubt on a major reason for the administrative decision that the public school placement was inappropriate. App. 32a. But the court refused to allow testimony about the significance of this evidence from the School District's witnesses or cross-examination of the respondents' witnesses based on the new documentary evidence.[1]

Plainly, under the broader *Cook* standard, evidence that was not proffered during the administrative hearing – *i.e.*, much of the evidence proffered here – would virtually always be admitted in the ensuing civil action. Moreover, evidence that was, in substance, in the administrative record would be admitted if the witness's credibility were at issue or if new evidence affected that witness's testimony or required addit-

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[1] The district court's admission of documents from Orange Grove that were not provided during the administrative hearing demonstrates that respondents' statement that the School District had "all records" five days prior to the administrative hearing (Opp. at 6) is simply wrong. Critical documents were not provided until discovery in the district court case.

ional cross-examination of that witness. The *Cook* test is faithful to the meaning and connotation of the statutory requirement that the court "shall hear additional evidence at the request of a party," because it allows the party to shape its evidentiary challenge to the administrative determination in a case by offering relevant evidence in addition to the administrative hearing record. In contrast, as this case illustrates, the *Town of Burlington* test gives the court virtually unfettered discretion to exclude evidence – on the grounds that: (i) the witness was available to be called at the administrative hearing; (ii) other witnesses testified on the same topic at the administrative hearing; (iii) the court can evaluate credibility from a transcript; (iv) all cumulative testimony is irrelevant; and (v) new documentary evidence does not warrant additional, explanatory testimony or cross-examination. Plainly, there is both a theoretical and a practical conflict between the *Town of Burlington* and *Cook* standards that should be resolved by the Court.

(b) Respondents next attempt to argue that *Town of Burington* is actually a flexible, multi-factor test that would allow the admission of evidence in all necessary circumstances. Opp. at 9. This case belies that contention. Equally to the point, the passage cited by respondents demonstrates the narrow scope given to the statutory requirement that the court "shall hear additional evidence at the request of a party." In their view, *Town of Burlington* allows for "the unavailability of witnesses, mechanical failures as to the transcript, the improper administrative exclusion of evidence and evidence of relevant subsequent events." Opp. at 9-10. *Town of Burlington* thus places a substantial burden of unavailability and necessity on a party seeking to introduce evidence in a challenge to a state administrative decision; that burden simply cannot be reconciled with the statutory language and structure. See also *Indep. Sch. Dist. No. 283* v. *S.D.*, 88 F.3d 556, 560-61 (8th Cir. 1996) (requiring "solid justification" to allow evidence other than the administrative record); *Monticello*

Sch. Dist. No. 25 v. *George L.*, 102 F.3d 895, 901-02 (7th Cir. 1996) (refusing to admit evidence other than the administrative record because there were no procedural errors by the administrative decision maker); *Springer* v. *Fairfax County Sch. Bd.*, 134 F.3d 659, 667 (4th Cir. 1998) (refusing to admit evidence to "patch up holes in the[] administrative case").[2]

Nor can *Cook* be read, as respondents read it, to endorse the limitations of *Town of Burlington*. The *Cook* court expressly declined to adopt *Town of Burlington*'s narrow construction of the requirement that the courts hear additional evidence, and simply suggests that *even* the *Town of Burlington* court might have allowed the testimony it was admitting. See *Cook*, 915 F.2d at 235.

Respondents are quite right that under both *Town of Burlington* and *Cook*, the trial court has discretion about whether to admit evidence in a civil action under the IDEA. Opp. at 11-12. But the IDEA makes clear that the court's discretion is simply that generally possessed by a trial judge in a civil action. A trial court does *not* have discretion, as *Town of Burlington* holds, to place the burden of justifying the admission of relevant evidence on the party challenging the administrative result and to exclude vast quantities of concededly relevant evidence on policy grounds. Only the *Cook* test is faithful to the statutory language and structure.

(c) Finally, respondents' suggestion – that the *Cook* test is inconsistent with this Court's instruction that reviewing courts give "due weight" to the administrative record and not substitute their judgment for that of the state educational authorities – is wrong. The IDEA itself requires the court to

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[2] *O'Toole* v. *Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 708-09 (10th Cir. 1998), is not relevant here. It does not discuss or adopt either the *Town of Burlington* or *Cook* standard; it simply affirms a district court's denial of a motion for the enlargement of time to submit additional evidence where counsel had provided no explanation for his failure to timely file.

hear additional evidence, to base its decision "on the preponderance of the evidence," and to grant the relief "the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(ii) & (iii). In the civil action the administrative record and additional evidence are thus weighed by the court *de novo*. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205 (1982). Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60 (1974) (although the employee's discrimination claim had been arbitrated, the court must "consider the employee's claim *de novo*" and "accord[] [the arbitral decision] such weight as the court deems appropriate").

* * * *

There is a meaningful and important difference between the conflicting tests employed by the courts of appeals, and this conflict goes to the heart of the statutory review process of the IDEA. Because *Town of Burlington* sets a very high standard for the admissibility of evidence other than the administrative record, civil actions challenging state IEP decisions under that standard are akin to petitions for review of agency action under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), decided on the administrative record. *Cook*, in contrast, recognizes that the IDEA does not limit a party to an appeal or petition for review of the state administrative decision, but rather authorizes a party to bring a "civil action" and to create a record in addition to the administrative record, 20 U.S.C. § 1415(i)(2). The difference in evidentiary standards means that different evidence will be admitted in civil actions conducted within different circuits. Different records will often lead to different results in the *de novo* proceedings required under this Court's decision in *Rowley*, 458 U.S. at 205. This is an important and outcome determinative conflict about the meaning of a federal statute that should be resolved by this Court.

2. In the Petition, we showed that the question presented here is recurring and important. Thousands of IEPs are prepared every year. Many of these IEPs are challenged in state

administrative proceedings and become the subject of litigation in state and federal courts; in virtually every such case, the court must construe the statutory requirement that it hear "*additional evidence at the request of a party.*" *20 U.S.C.* § 1415(i)(2)(B)(ii). Respondents do not dispute that the issue is recurring, but they contend that there is no significant interest in having a uniform interpretation of the statutory requirement and, indeed, that "[a] singular standard urged by Petitioner would be antithetical to the design of IDEA." Opp. at 15. This is plainly wrong, and the amicus curiae brief of the National School Boards Association ("NSBA"), *et al.*, demonstrates clearly the overriding need for uniformity in this context.

There is no conceivable benefit, but there is substantial harm arising from the existence of conflicting interpretations of the IDEA. In enacting the IDEA, Congress balanced its interest in funding free, appropriate education for disabled students with its intent to leave decisions about education policy and practices with the states. *Rowley*, 458 U.S. at 200-04, 207-08. Congress thus created a dispute resolution process that allows substantial variation in state administrative proceedings, but also places the judiciary in an important role by allowing aggrieved parties to file civil actions challenging the results of these varied state proceedings. Put differently, Congress' enactment of federal law governing certain aspects of IEP review *precisely shows* where uniformity, rather than state-law variation, is necessary. Moreover, the structure of the IDEA makes clear that the judicial review mandated by the statute is a safeguard to vitiate, where necessary, the effects of the varied state procedures and to ensure that the strong federal interest in the appropriate expenditure of federal funds is served. See Pet. at 16-17. That is particularly necessary because the administrative processes of some States, such as Georgia, the State at issue, do not authorize

discovery during IEP administrative proceedings.[3] It thus makes no sense to argue, as respondents do, that there is no interest in uniform judicial standards governing IDEA actions, because the statute allows variation in the state administrative schemes.[4]

Finally, respondents' contention entirely overlooks the fundamental unfairness that a lack of uniformity imposes on children, parents, and school districts. The federal rights of students, parents and school districts should not depend on geography or on whether the party challenges the IEP determination in federal or state court. It is, in short, respondents' proposal – that the conflict remain unresolved – that is "antithetical to the design of IDEA" (Opp. at 15) and inconsistent with Congress' creation of a civil action governed by federal law.[5]

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[3] Respondents acknowledge that Georgia does not allow discovery during IEP administrative proceedings. Opp. at 4. Respondents contend, however, that the School District had discovery because its expert was permitted to observe Jensine Bennett at her private placement. *Id.* at 5. The fact that the School District's expert was permitted to observe Jensine (despite respondents' objection) does not mean that the School District was not prohibited from conducting discovery, as respondents assert; the School District's expert did not meet with Jensine's teacher or have access to all Orange Grove records. In fact, as noted above, the School District was not able to obtain significant evidentiary materials prior to the hearing.

[4] Respondents do not deny that their restrictive definition of "additional evidence" would have the consequence of forcing state administrative proceedings to be more adversarial. They allege, however, that the School District's construction and the plain meaning of the IDEA would allow a party to withhold arguments and evidence during the administrative process to sandbag the opposing party in the court case. Opp. at 21. The incentives to withhold strong evidence, and thus to decrease one's chances of success in the less expensive, less adversarial administrative process, are vanishingly small, however. Almost all parents or school districts will prefer to win sooner, rather than later.

[5] In support of their argument that there is no interest in a uniform interpretation of section 1415(i)(2)(B) of the IDEA, respondents point out that the IDEA lacks a statute of limitations and thus borrows a limitations

3. Respondents' argument that the evidence proffered by the School District would have been excluded under the Federal Rules of Evidence is both new and wrong. Neither the trial court nor the court of appeals even intimated that the evidence was excluded on this basis, nor could it have been.

First, respondents argue that twelve of the 19 items of evidence at issue were excluded as cumulative under Federal Rule of Evidence 403. Opp. at 17. Even on respondents' count, however, that leaves seven items of evidence wrongly excluded. On any fair reading of the trial court's opinion, moreover, it excluded the evidence *not as cumulative under Federal Rule of Evidence 403, but as cumulative in light of the standard for admissibility set in Town of Burlington.* App. 86a-105a. Finally, even respondents admit that the exclusion of cumulative evidence under Rule 403 is a matter of discretion, and the trial court here did not exercise its discretion under the Rule. Indeed, few courts would have excluded the proffered evidence under Rule 403. A cumulation of relevant evidence in support of a particular point in dispute is undeniably probative, and evidence is generally excluded as cumulative only when it does not go to the crux of a disputed issue or when so much evidence has already been admitted that an additional item can have little effect. That is plainly not the case here.

Second, respondents appear to argue that the evidence proffered by the School District was not relevant under Federal Rules of Evidence 401 and 402. Opp. at 19-20. Again, neither the trial court nor the court of appeals addressed or excluded the evidence on this basis. The evidence is plainly relevant as that word is defined in Rule 401 (relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the deter-

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period from state laws. That is precisely the point. The IDEA does not mandate a statute of limitations; in contrast, here, the IDEA *contains* a statutory provision mandating the hearing of additional evidence in the civil action.

mination of the action more probable or less probable than it would be without the evidence"). Respondents' contention seems to be that evidence that is cumulative is also irrelevant, although they cite no authority in support of that proposition. In any event, as stated above, even respondents do not contend that all of the proffered evidence is cumulative or irrelevant (nor could they, see, *e.g.*, 100a (Ms. Cannon); 105a ("other issues" to be testified to by Ms. Lesperance); *id.* (Ms. Drennan)). Finally, respondents are simply wrong that this evidence would be excluded as cumulative, see *supra*.

The trial court refused to hear relevant additional evidence proffered by the School District, and that decision was affirmed by the court of appeals, relying upon *Town of Burlington*. This case thus squarely presents the question of the meaning of the IDEA requirement that, in a civil action challenging a state administrative decision concerning an IEP, a court "shall hear additional evidence at the request of a party" 20 U.S.C. § 1415(i)(2)(B)(ii).

* * * *

As set forth in the Petition, the court of appeals incorrectly construed an important federal statute, wrongly decided a recurring question of federal law, and added to an existing, mature conflict among the courts of appeals. Indeed, this conflict is part of the widespread "confusion as to the exact nature of the IDEA proceedings before the district courts." *Kirkpatrick* v. *Lenoir County Bd. of Educ.*, 216 F.3d 380, 385 & n.4 (4th Cir. 2000). This Court should grant the petition to dispel the confusion and resolve the conflict on this important and recurring question.

CONCLUSION

For the reasons stated above and those stated in the petition and the amicus brief of the NSBA, the petition for certiorari should be granted.

Respectfully submitted,

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